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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 771

THE LONG ISLAND RAIL ROAD COMPANY

Defendant and Third-Party
Plaintiff-Petitioner,

against

CENTRAL ISLIP COOPERATIVE G. L. F.
SERVICE, INC.,

Third-Party Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Defendant and Third-Party
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CENTRAL ISLIP COOPERATIVE G. L. F. SERVICE INC.,

Third-Party Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, The Long Island Rail Road Company, prays that a writ of certiorari issue to review that part of a judgment of the Court of Appeals for the Second Circuit entered in the above cause on November 16, 1956, affirming the part of the judgment of the United States District Court for the Eastern District of New York which awarded petitioner, The Long Island Rail Road Company, con-

tribution of $50,000 and not full indemnity against Central Islip Cooperative G.L.F. Service, Inc., respondent, which it had impleaded as third-party defendant. The main judgment entered by the original plaintiff Wanser was for $100,000.

The Opinions of the Courts below

There was no opinion written by the Trial Court. A memorandum was attached to petitioner's motion papers for a new trial, upon which was endorsed "Motion denied." In the Court of Appeals for the Second Circuit, the opinion of the Court was written by Chief Judge Clark and a separate concurring opinion was written by Judge Hand. The opinions of the United States Court of Appeals are reported in 238 F. 2d 467 and are appended at pages 1a to 8a. The petitioner has satisfied the main judgment, but has not proceeded on its judgment over against respondent industry pending the filing of the within petition.

Jurisdiction

1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

2. The judgment of the Court of Appeals for the Second Circuit, affirming the judgment of the District Court was dated and entered on November 16, 1956 and is appended hereto at pages 9a to 10a.

The Questions Presented

1. In a standard side track agreement an industry agreed (a) to keep a side track clear of snow and ice and other obstructions and (b) to indemnify and hold harmless a railroad company for damage or injury from any

act or omission of the industry to anyone not a party to the agreement using the side track but that if any claim or liability arose from the joint or concurring negligence of both parties to the agreement it was to be borne equally.

Under the agreement is a railroad which has been held liable to a railroad employee for personal injuries on the ground that because of the presence of snow and ice it had failed to provide a safe place to work, entitled to full indemnity from the industry?

2. In the same standard side track agreement the industry agreed not to erect or allow to be erected any building or structure or fixture of any kind nearer than eight feet from the center of the side track. At the time the agreement was executed and for several years thereafter up to and including the date of the accident herein to the knowledge of the industry the running rails of the side track were closer than the eight feet provided for in the agreement.

Under the agreement is a railroad which has been held liable to a railroad employee for personal injuries on the ground that it has failed to provide a safe place to work, entitled to full indemnity from the industry, whether the proximate cause of the injury was the existing close clearance or the failure of the industry to keep the side track clear of snow and ice?

3. May a District Judge properly, by a categorical statement, instruct a jury that there is concurrent negligence, without first defining concurrent negligence and then referring the jury to facts in evidence to ascertain if there is concurrent negligence in the case at Bar?

4. May a District Judge properly leave the determination of the legal effect of the indemnity provisions of a Standard Side Track Agreement to a jury to decide?

5. Where a railroad has become liable for an injury to an employee, due to the primary negligence of an industry in failing to make safe a dangerous condition, that is, where an industry has notice that snow and ice have accumulated several days upon a pitched roof abutting a side track and fails to remove the same, thus creating an unsafe place to work, and where the railroad has not acquiesced in the continuation of the dangerous condition; is the railroad entitled to full indemnity for the payment made by it, upon common law principles of indemnity?

Statutes Involved

The statutes and statutory rules involved are the Federal Employers' Liability Act of 1908, as amended (Act of April 22, 1908, c. 149, § 1, 35 Stat. 65, 45 U.S.C. § 51; and the Federal Rules of Civil Procedure, as promulgated and amended pursuant to 28 U.S.C. § 2072.

The pertinent portions of these statutes and rules are appended hereto starting at page 11a.

Statement

Robert R. Wanser, a brakeman in the employ of the petitioner, brought suit under the Federal Employers' Liability Act to recover damages for injuries sustained by him on January 18, 1954, while working in and about a siding located at Central Islip, New York.

Petitioner thereafter interposed its answer and obtained an order to implead the respondent industry as a third-party defendant. The petitioner then instituted a third-party action against the respondent industry, pleading two separate causes of action based upon a written indemnity agreement and common law indemnity. At the end of plaintiff Wanser's case the petitioner moved to dismiss

the Wanser cause of action and further moved for a directed verdict at the close of both the plaintiff Wanser's and the petitioner's cases, which motions were denied. At the close of the entire case, the petitioner moved for a directed verdict in the third-party action which was denied. (221; 280-1; 332)*

The jury returned a verdict for plaintiff Wanser against petitioner in the sum of $100,000 and in favor of petitioner against the respondent industry in the sum of $50,000 (402). The petitioner renewed its motion for a directed verdict on the entire cases, moved to set aside the verdict and moved for judgment over and against the respondent industry, all of which were denied (403-5). Thereafter, petitioner moved for judgment notwithstanding the verdict under Rule 50 (b) and its motion was denied (2).

The proof at the trial showed the following main facts:

On or about January 14, 1954, the petitioner sent a box car loaded with feed to respondent industry's siding. The employees of the respondent industry unloaded the shipment over a period of about three days (30-1, 58, 75, 112-3, 146, 301, Exh. 7-420). On the morning of January 18, 1954, the respondent industry advised the petitioner that the box car was empty and desired its removal. The petitioner dispatched a crew, including plaintiff Wanser, to respondent-industry's siding to move the empty and to bring in a new filled car (75, 143-4, Exh. F, 452-3). At about 10:00 a. m. the crew arrived at the siding. It received instructions from respondent industry's foreman as to the work to be performed, and proceeded to push an engine and two cars on the respondent industry's siding to couple with the empty. The coupling operation was performed smoothly (75, 145, 149, 152-4; 159-162, 231 Exh. F, 440-4). For this operation the plaintiff stationed

* Numbers in parentheses refer to pages of the appendix.

himself at the westerly end of the warehouse building between its southerly side and the north side of the empty. His body was facing in a southerly direction—his back to the warehouse building and his face was directly to the west (153). The roof of this warehouse building facing the side track was a steep, sharply peaked roof—running down from its peak at a sharp pitch of about 45 degrees. The roof was covered by sheet metal or tin, had no gutters, and contained no snow guards to prevent snow and ice from accumulating on the roof and sliding down therefrom. This pitched roof did not terminate at the southerly side of the building but continued on and hung over the building for some 8 to 10 inches (42-3, 68-9, 73, 94, 217-8, 242, 264, 268, Exh. 14-424, Exh. F-440, 449).

As the coupling operation was completed, plaintiff Wanser intended to give the "go ahead" signal to remove the train from the siding. Before this signal had been relayed to the engineer, for the movement of the train, snow and ice fell from respondent industry's roof, striking plaintiff Wanser in the back and knocking him down in the space between the empty car and the car west of it, to which it had been coupled. No part of the train hit the plaintiff—the "go head" signal was never passed. As a result of the accident, plaintiff Wanser sustained injuries to his back (154, 162, 231-3, 277-8, Exh. 14-424).

The Weather Bureau Reports indicate that beginning January 10, 1954 and through January 17, 1954, it had snowed almost continuously, reaching a daily precipitation as high as seven inches of snow. During this period there was as much as nine inches of snow on the ground (Exh. 6-418).

Other facts will be presented in the course of the argument supporting the reasons for granting the writ of certiorari.

Specifications of Error

The Court of Appeals for the Second Circuit erred:

1. In affirming the judgment of the District Court.

2. In not reversing that part of the judgment of the District Court which awarded petitioner contribution of $50,000 and not full indemnity against respondent.

3. In approving the charge of the Court relating to concurrent negligence.

4. In holding that the petitioner could properly be held equally culpable with respondent because the petitioner had built its tracks in an unsafe place.

Reasons Relied On for the Granting of the Writ

The petitioner believes that a writ should be granted for the following reasons:

The Court below in rendering its decision has placed an interpretation upon the indemnity clause in the agreement which is the subject of this suit and the interpretation and its decision is at variance with the decisions in at least three, if not four Circuit Courts. The reasoning used by the Court below in reaching its result and in interpreting the clause conflicts with the rationale of other Circuits.

The indemnity clause which is involved herein is a uniform clause used generally by carriers throughout the United States. Therefore, the proper interpretation and application of this particular clause is a matter of general interest to all carriers and to the industries which they

serve, thus giving the decision below an importance that transcends the controversy herein presented.

1. *The decision and the rationale of the Court below are in conflict with that of at least three if not four other Circuit Courts.*

The Court below refused to allow petitioner complete indemnity pursuant to the uniform indemnity clause of petitioner's "Standard Agreement for Side Track and Switch Connection."

It also held that the jury could have found that there was equal culpability—the Railroad having built its tracks in an unsafe place and the respondent once aware of the peril, having failed to warn the plaintiff Wanser of it.

These conclusions by the Court below are in conflict with the decisions in other Circuits, namely:

Deep Vein Coal Co. v. *Chicago & E.I.R. Co.*, 7 Cir. 71 F (2d) 963 (1934);
Booth-Kelly Lumber Co. v. *Southern Pacific Co.*, 9 Cir., 183 F (2d) 902 (1950);
Atlantic Coast Line R. Co., et al v. *Robertson*, 4 Cir. 214 F (2d) 746 (1954);
Baltimore and Ohio R. Co. v. *Alpha Portland Cement Co.*, 3 Cir. 218 F (2d) 207 (1955).

The Uniform Indemnity Clause

On November 8, 1948 the Respondent Industry entered into an agreement with the Railroad known as a STANDARD AGREEMENT FOR SIDE TRACK AND SWITCH CONNECTION. As denominated, this agreement is a standard agreement for the purpose of defining certain rights and obligations of each of the respective parties in connection with the operation of the side track and appurtenances.

The agreement contained the following pertinent provisions:

"The Industry agrees to exercise the greatest care both in the use of said side track and switch connection and to prevent cars which have been placed thereon for its use or benefit from getting out upon or close to the main tracks of the Railroad Company, and the Industry agrees to keep said track and switch connection clear of snow, ice and other obstructions, and not to erect or allow to be erected any building, structure or fixture of any kind nearer than 8 feet from the center thereof measured laterally therefrom and nearer than 21 feet above top of rail measured vertically therefrom, except platforms which shall not be less than 6 feet 6 inches from said center of track or more than 3 feet 10 inches above said top of rail, unless such distances are otherwise indicated upon the blue print attached hereto, which shall then govern.

* * * *

"*The Industry also agrees to indemnify and hold harmless the Railroad Company for loss, damage, or injury from any act or omission of the Industry, its employees or agents, or any one not a party to this agreement using said side track and switch connection, their employees or agents, to the person or property of the parties hereto and their employees, and to the person or property of any other person or corporation, while on or about said side track and switch connection; and if any claim or liability* other than from fire *shall arise from the joint or concurring negligence of both parties* hereto, or the joint or concurring negligence of any one not a party to this agreement using said side track and switch connection and the Railroad Company, it shall be borne equally by the Industry and the Railroad Company." (Emphasis added.) (Exh. A-428)

The language of the above indemnity clause has been standard and uniform since 1921. It was the result of conferences among nearly all the railroads subject to the Interstate Commerce Act who were parties to a proceeding pending before the Interstate Commerce Commission. See *National Industrial Traffic League* v. *Aberdeen R.R.R. Co.*, 61 I.C.C. 120.

The Courts in the four cases previously cited have held that the Railroad is entitled to complete indemnity from the Industry for injuries sustained by Railroad employees due to the negligence of the Industry where the original claim was made by the employee under F.E.L.A.

In the instant case it is the petitioner's position that the evidence shows that the accident out of which the original action arose, was caused when the snow and ice were precipitated upon the plaintiff Wanser. This snow and ice had accumulated on the pitched roof of the respondent's warehouse building and an employee of the respondent admitted that the respondent knew of the condition prior to the accident, did not clear or remove the accumulated snow and ice, nor did it warn the petitioner's employees of this condition and that the respondent was aware of the dangerously constructed steep, pitched roof and overhang (21-2, 49, 77-8, Exh. C, 94, 99, 103, 105, Exh. F, 440, 442-3, 444, 448, 452-3).

Under the Standard Side Track Agreement the respondent was obliged to keep this siding free and clear of snow and ice, a covenant which it patently violated. In addition, as owner and possessor of the warehouse building, it was required to maintain its premises in a reasonably safe condition for the protection of persons walking and working in and about the warehouse. *Kleper* v. *Seymour House Corp.*, 246 N. Y. 85 (1927); *Clapper* v. *Zubres*, 261 App. Div. 850 (1941), aff'd 285 N. Y. 770 (1941); *Van Slyke* v. *Fivey*, 266 App. Div. 889 (1943); *Fodera* v. *Booth American Shipping Corp.*, 2 Cir., 159 F. (2d) 795 (1947).

The Issue of Equal Culpability

Petitioner consistently contended at the trial that the matter of clearance was irrelevant to any of the issues in the case and could not be considered the proximate or legal cause of the accident. It is submitted that it was overwhelmingly clear that the plaintiff was injured when he was struck by snow and ice and this was the sole cause of the accident. If it is conceded by way of argument that the clearance has any application to the case at the Bar, it was the respondent which was obliged to maintain adequate clearance under the Side Track Agreement, and the Railroad would be entitled to complete indemnity on the basis of the agreement. The written agreement which was signed on November 8, 1954, rather than some common law rule, controls on the question of indemnity, to govern the rights and liabilities of the parties. When the parties contemplated that there might be claims for indemnity, they also must have been cognizant of the fact that under ordinary circumstances the occasion for seeking indemnity would not arise unless the petitioner, indemnitee, had itself been found guilty of some negligence, for otherwise no judgment could be recovered.

The fact that the petitioner herein knew that its tracks were closer than the 8 feet provided in the agreement, is not of itself sufficient to bar petitioner from restitution or indemnity. That the petitioner had such knowledge at the time the agreement was executed, and the fact that the respondent had similar knowledge makes it more compelling that the petitioner should be fully indemnified in the face of injury to plaintiff Wanser. In *Booth-Kelly Lumber Co.* v. *Southern Pacific Co., supra,* the court accepted this principle and quoted from the Comment under Section 95 of the Restatement on Restitution as follows:

> "In all of these situations the payor is not barred by the fact that he was negligent in failing to discover

> or to remedy the defect as a result of which the harm was occasioned; in most of the cases it is because of this failure that he is liable. * * *
>
> "The fact that the payor knew of the existence of the dangerous condition is not of itself sufficient to bar him from restitution. In many cases it is only because he had knowledge of the condition that he is liable to the person harmed." (page 907)

In other words the respondent Industry signed the Side Track Agreement with full knowledge that a dangerous condition existed, namely, the close clearance of the tracks. After it signed the agreement the responsibility of maintaining the area in the vicinity of the side track shifted to the respondent Industry. It had then, two alternatives: The respondent Industry could correct the dangerous condition so that no accident could occur, or it could leave the condition as it found it and be prepared to pay damages in the event of injury, pursuant to its written promise to indemnify. The covenant agreed to by the respondent Industry, namely "Not to erect or to allow to be erected any building, structure or fixture of any kind nearer than 8 feet from the center of the (side track)" imposed upon the Industry the obligation of maintaining adequate clearance. See *Deep Vein Coal Co.* v. *Chicago & E.I.R. Co., supra, Booth-Kelly Lumber Co.* v. *Southern Pacific Co, supra,* and *Buckeye Cotton Oil Co.* v. *Louisville & N.R. Co.,* 6 Cir., 24 F. (2d) 347 (1928); *Gollick* v. *New York Central R. Co.,* 138 F. Supp. 384 (E. D. Mich. 1956); *Watkins* v. *Baltimore & O. R. Co.,* 29 F. Supp. 700 (W. D. Pa., 1939).

Consequently, if the close clearance of the tracks was a contributing cause of the accident, then the respondent Industry is obliged to reimburse the petitioner because of its indemnity covenant in the Side Track Agreement.

Common Law Indemnity

If the provisions of the Side Track Agreement were not applicable to the facts of this case, which is not conceded by the petitioner, a review of the evidence shows overwhelmingly that the primary, active negligence which caused the accident was that of the respondent Industry, in requesting and directing the petitioner's employees to perform a switching operation despite its knowledge that the dangerously pitched roof and overhang of its warehouse building were covered with accumulated snow and ice; in permitting and allowing the roof to be and remain covered with snow and ice, despite the absence of gutters and/or snow guards, and in failing to remove the snow and ice. Thus, if the Side Track Agreement were not applicable to the facts in the instant case, and since the question of clearance was at best a passive condition, upon common law principles the petitioner would be entitled to complete indemnity for the Industry's primary and active negligence. *Ryan Stevedoring Co. Inc.* v. *Pan Atlantic Steamship Corp.*, 350 U. S. 124 (1956), 76 S. Ct. 232, 100 L. Ed. 146 (1956); *Waylander-Peterson Co.* v. *Great Northern R. Co.*, 109 F. Supp. 552 (1952), aff'd, 8 Cir., 201 F. (2d) 408 (1953).

See also *United States* v. *Chicago R. I. & P. R. Co.*, 10 Cir., 171 F. (2d) 377 (1948); *Burris* v. *American Chicle Co.*, 2 Cir., 120 F. (2d) 218 (1941); *Gulf, Mobile & Ohio R. Co., et al.* v. *Arthur Dixon Transfer Co.*, 343 Ill. App. 154, 98 N. E. (2d) 786 (1951); *Scott* v. *Curtis*, 195 N. Y. 424 (1909); *New York Central R. Co.* v. *Barnet*, 192 App. Div. 784 (1920).

In substance, the respondent Industry would be liable under common law principles of indemnity since the place was made unsafe by reason of the primary and active negligence of the respondent Industry.

2. *The Court of Appeals erred in approving the charge of the Court relating to concurrent negligence and in approving the Trial Court's failure to instruct the jury as to the meaning and application of the Indemnity Agreement.*

The Charge on Concurrent Negligence

On the day before his charge to the jury the Court denied a request of counsel for the respondent Industry to charge the jury which was labeled No. 22[1] (359). Despite the denial of this request, in the midst of the charge to the jury, at the request of the Industry, the Court made the following charge:

> "But I will charge you, in accordance with the request, that in considering the question of negligence, the original construction of the railroad siding at the point where the accident happened and erected it in too close proximity of the existing building and that such negligence contributed to the happening of the accident and that the negligence of the third-party defendant at a later date concurred in producing the injury, then there is concurrent negligence." (394)

It was highly improper for the Court to charge, as he did. Assuming, arguendo, that there was a true question of concurrent negligence herein the request No. 22 as submitted by the respondent Industry would have been a more preferable presentation of the question of concurrent negligence, than that as delivered by the Court.

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[1] If the jury finds that the Long Island Rail Road Company was negligent in the original construction of the railroad siding at the point where the accident happened and erected it in too close proximity of the existing building and that such negligence contributed to the happening of the accident and that the negligence of the third-party defendant at a later date concurred in producing the injury, then there is concurrent negligence (Ind Req. 22-383).

However, in paraphrasing the request No. 22 as submitted by the respondent Industry, and in changing the wording thereof, the charge became not only erroneous but amounted to a usurpation of the jury's province and was tantamount to a direction by the Court that as far as the Railroad was concerned it was at least guilty of "concurrent negligence." The language used by the Court left the jury with no alternative but to saddle the Railroad with at least one-half of the verdict for the plaintiff, since it bespeaks positively that the clearance was to be considered by the jury as an element of the petitioner's "concurrent negligence." Thus, the charge precluded consideration of a vital issue as to which the petitioner had the burden of proof and under such circumstances the petitioner is entitled to a new trial on the question of full indemnity (*Ruddy* v. *New York Central Railroad Co.*, 224 F. 2d 96 (1955), Cir. 1955 cert. denied 350 U. S. 884).

In addition, the granting of the request at that particular time, after Counsel's summation, had been delivered to the jury, predicated upon the Court's rulings the prior day was not only erroneous in law, but a violation of Rule 51 of the Federal Rules of Civil Procedure, and prejudicial to petitioner.

The Charge in Reference to the Indemnity Agreement

The petitioner submitted requests numbered 23 and 24 which dealt with the indemnity provisions of the Side Track Agreement.[2] The Court stated that he would charge these requests (345-347).

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[2] "23. That if you find that the accident was caused by reason of the negligence of the third-party defendant in failing to keep the roof, as constructed, free of ice and snow, and that the accident was caused by reason of the fall of ice and snow upon the plaintiff from the said roof, then the defendant, Long Island Rail Road, is entitled to a judgment over for whatever sums may be awarded the plaintiff against the defendant." (376)

(*Footnote continued on following page*)

Anticipating that the Industry would request a charge on "joint or concurrent negligence" contained in the Indemnity Agreement, counsel for the petitioner requested the Court to charge:

> "In the event the third-party defendant requests the Court to charge the language of the 'concurrent negligence' provision of the Indemnity Agreement, then I request the Court to charge that if the jury finds that the defendant, Long Island Rail Road Company, did not have actual notice of the presence of the accumulated snow and ice on or abutting the third-party defendant's warehouse building, and that this accident was solely caused by reason of the precipitation of snow and ice upon the plaintiff from the third-party defendant's roof, then the jury must find that the Railroad is entitled to complete indemnification and not to partial indemnification under that provision." (346-7)

The Court stated that he would so charge these requests (347).

On the following day when the Court charged the jury, he did not include in his charge any of the requests which were granted the day before, and failed to properly instruct the jury as to the applicable law concerning the rights and obligations of the parties arising out of the

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(*Footnote continued from preceding page*)

"24. That if you find that the defendant, Long Island Rail Road Company, was guilty of negligence in failing to afford the plaintiff with a safe place to work, and if you find that this negligence was as a result of the failure of the third-party defendant to maintain its premises in a reasonably safe condition and in violation of the Side Track Agreement, then you must return a verdict in favor of the defendant, Long Island Rail Road Company, against the third-party defendant for the sum of money you may award to the plaintiff." (376)

Side Track Agreement. It is important to set forth that part of the charge to reveal its inadequacy:

> "With respect to the first cause of action as to the agreement by the railroad and the Industry, the railroad has the burden of proving by a fair preponderance of the evidence the material statements in that cause of action which the Industry has disputed. If you find that the railroad has so proven those facts, then your verdict on that cause of action should be in favor of the railroad against the Industry.
>
> If you find that the plaintiff's injury was caused, *as a matter of law,* by the negligence of the Industry, its agents, servants and employees, your verdict in favor of the railroad against the Industry should be for the full amount of your verdict in favor of the plaintiff against the railroad; but if you find that the plaintiff's injuries were caused by the joint or concurrent negligence of both the Industry and the railroad, then your verdict in favor of the railroad against the Industry should be for one-half the amount of your verdict in favor of the plaintiff against the railroad." (Emphasis added.) (391-2)

In the last quoted part of the Court's charge concerning the effect of the Indemnity Agreement herein the Court referred to the words of the Indemnity Agreement, and stated that if the accident was caused "by the joint or concurrent negligence" of the Industry and the Railroad, then the Railroad was entitled to a verdict against the Industry of one-half of the sum awarded the plaintiff. At that point, the Court did not instruct the jury, as he should have done, as to the proper meaning and application of the phrase, "joint or concurrent negligence" which has its own peculiar meaning as shown by the cases previously cited herein, namely; *Deep Vein Coal Co.* v. *Chicago & E.I.R. Co., supra; Booth-Kelly Lumber Co.* v.

Southern Pacific Co., supra; Atlantic Coast Line R. Co., et al. v. *Robertson, supra; Baltimore and Ohio R. Co.* v. *Alpha Portland Cement Co., supra.*

In using the term "matter of law" in the first part of the charge, which on its face is improper, no one can measure the effect of this improper charge in the deliberations of the jury. This charge on a most vital point of the case, namely the indemnity, was never adequate and was certainly misleading and confusing.

The opinion of the Court below by Chief Judge Clark conflicts with the principles of indemnity under the so called Standard Side Track Agreement applied by other Circuit Courts in the cases cited herein, and accordingly should be reviewed by the Court in order to resolve the conflict which now has arisen between the Circuits.

CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Appendix

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 94—October Term, 1956.

(Argued October 11, 1956 Decided November 16, 1956.)

Docket No. 24171

ROBERT R. WANSER,
Plaintiff-Appellee,

—v.—

LONG ISLAND RAILROAD COMPANY,
Defendant-Appellant and Third-Party Plaintiff-Appellant-Appellee,

—v.—

CENTRAL ISLIP COOPERATIVE G. L. F. SERVICE, INC.,
Third-Party Defendant-Appellant-Appellee.

Before:

CLARK, *Chief Judge*, and
L. HAND and SWAN, *Circuit Judges.*

Appeals from judgments of the United States District Court for the Eastern District of New York, Robert A. Inch, *Judge.*

Long Island Railroad Company appeals from a judgment for $100,000 against it in favor of Robert Wanser in

his action for personal injuries under the Federal Employers' Liability Act, 45 U. S. C. A. §51 *et seq.;* it also appeals from a judgment awarding it contribution of $50,000 and not full indemnity against Central Islip Cooperative G. L. F. Service, Inc., which it had impleaded as third-party defendant; and the third-party defendant appeals from the judgment against it. Affirmed.

WILLIAM A. BLANK, Brooklyn, N. Y., *for plaintiff-appellee.*

MARVIN V. AUSUBEL, New York City (William J. O'Brien, A. Harold Frost, and Bernard Jenkins, on the brief), *for defendant-appellant and third-party plaintiff-appellant-appellee.*

PATRICK E. GIBBONS, New York City (Galli & Locker and Oscar A. Thompson, New York City, on the brief), *for third-party defendant-appellant-appellee.*

CLARK, *Chief Judge*:

These are appeals from district court judgments awarding plaintiff $100,000 damages on the verdict of a jury against his employer, the Long Island Railroad Company, and awarding the Railroad $50,000 as contributions but not indemnity against the Central Islip Cooperative G. L. F. Service, Inc., impleaded as a third-party defendant by the Railroad. Islip owned the siding on which the plaintiff was working when he was injured. Plaintiff, a brakeman, was standing in a narrow space between Islip's warehouse and the Railroad's box car when he was struck and injured by

falling snow and ice. The Railroad is appealing the judgment against it, as well as the judgment in its favor insofar as the latter does not require full indemnity over to it, while the third-party defendant appeals the judgment against it.

Upon the trial the jury could have found the following facts: The warehouse was standing in its present position when the Railroad laid a siding track next to it, so located that the roof of a box car spotted opposite the western door of the warehouse was on the same level as the roof of the warehouse and less than eighteen inches from the warehouse eaves. On the day of the accident, January 18, 1954, a box car had been standing in that position for four days, with snow accumulated on its roof and the roof of the warehouse from the heavy snowfall which had occurred almost every day of the previous week. On that morning at the request of Islip's mill foreman the Railroad sent a crew consisting of plaintiff, two other brakemen, and a conductor to remove the empty box car. The conductor did not supervise the operation, however, but instead went to check on another train that was late.

The three brakemen backed a train along the siding, coupled it to the empty box car, and were about to move the train forward when the accident happened. During this operation plaintiff stood on icy footing between the box car and the building under the bridge of snow and ice so that he could observe the coupling. When the coupling was accomplished he faced the locomotive and signaled to move ahead. Another brakeman was standing facing him sixty feet down the track, to relay plaintiff's signal to the locomotive; but this brakeman failed to warn plaintiff of the bridge of snow overhead. Nor had plaintiff been warned by Islip's mill foreman, who gave plaintiff his instructions and who had noticed the snow bridge two days before. Plaintiff, his attention focused on the slippery footing

below, gave the signal and was instantly hit by falling ice and snow. For the resulting injuries the jury has awarded him $100,000 damages against the Railroad.

The Judgment Against the Railroad

We think there was evidence to sustain the several alleged acts of negligence which the trial judge submitted to the jury. One of these—as to the location of the tracks—is the subject of particular objection on this appeal and must be separately considered. The judge charged:

> "• • • But I will charge you, in accordance with the request, that in considering the question of negligence, the original construction of the railroad siding at the point where the accident happened and erected it in too close proximity of the existing building and that such negligence contributed to the happening of the accident and that the negligence of the third-party defendant at a later date concurred in producing the injury, then there is concurrent negligence."

The Railroad's position is that even if the location of the tracks too near the warehouse may have created an unreasonable risk that plaintiff would be struck by a moving train, yet the present injury was not the product of that risk, but was caused by falling snow. It is true that liability for negligence must be predicated upon an injury from that very peril occasioned by the defendant's breach of duty. See Restatement of the Law of Torts § 281, comment e (1934). But the jury could have found that by so locating its tracks the Railroad also created an unreasonable risk of injury caused by the fall of ice and snow which "bridged" between the warehouse eaves and railroad cars spotted for loading or unloading at the western door. Whether a reasonable man would have foreseen such a peril seems very

similar to the question whether a reasonable man constructing a roof would foresee the likelihood that it would cause snow to fall on passers-by below. E.g., *Shipley* v. *Fifty Associates*, 101 Mass. 251 (1896); *Klepper* v. *Seymour House Corp.*, 246 N. Y. 85, 158 N. E. 29 (1927); *Pease* v. *Shapiro*, 144 Me. 195, 67 A. 2d 17 (1949); *Landreville* v. *Gouin*, 6 Ont. Rep. 455 (1884); cases collected in Annotation, 62 A. L. R. 964.

It is apparent, therefore, that the evidence was adequate to show negligence at common law. In any event it satisfies the liberal standards properly applied in the interpretation of the Federal Employers' Liability Act in the light of the Supreme Court's frequent admonitions that appellate judges are not there to substitute their ideas of negligence for those of the jury. E.g., *Lavender* v. *Kurn*, 327 U. S. 645, 653 (1946); *Cahill* v. *The New York, N. H., and Hartford R.R. Co.*, 224 F. 2d 637, *rev'd* 350 U. S. 898, *opinion recalled and case remanded to this court*, —— U. S. —— (June 4, 1956), *judgment for plaintiff aff'd per curiam*, —— F. 2d —— (August 22, 1956); and cases cited 224 F. 2d 637 at 640.

The Railroad claims that there was inadequate proof that it had notice of the bridged snow, and that without such notice there was no duty to warn. But the bridge was in clear view, and a fellow employee was facing it before and during the time it fell on the plaintiff.

The Judgment Against Islip

In attacking the limited judgment it was awarded against Islip, the Railroad relies not only on its legal contention that the primary negligence was Islip's but also on the ground that it was entitled to full indemnity under the terms of its siding agreement with Islip. The pertinent part of that agreement is as follows:

"The Industry [Islip] also agrees to indemnify and hold harmless the Railroad Company for loss, damage, or injury from any act or omission of the Industry, its employees or agents, or any one not a party to this agreement using said side track and switch connection, their employees or agents, to the person or property of the parties hereto and their employees, and to the person or property of any other person or corporation, while on or about said side track and switch connection; and if any claim or liability other than from fire shall arise from the joint or concurring negligence of both parties hereto, or the joint or concurring negligence of any one not a party to this agreement using said side track and switch connection and the Railroad Company, it shall be borne equally by the Industry and the Railroad Company."

The Railroad objects to the action of the judge in submitting the issue of a possible concurrent negligence to the jury. But it was not error to instruct the jury that there was concurrent negligence if the Railroad's negligence in laying the track concurred with Islip's later acts of negligence in producing the injury. The Railroad argues that its manner of laying the track, even if it constituted "negligence" under the F. E. L. A., could not constitute "negligence" within the meaning of the contract. But the parties to the contract are held to have known of the existence of the federal statute at the time they executed their agreement, and we would surely have to torture its clear words to find they intended in cases such as this that the Railroad's "negligence" to its employee was to be determined under the federal statute for one judgment and under the common law for the other.

It is also suggested that the instruction quoted above may have misled the jury into believing that at law the Railroad was only entitled to 50% indemnity if it mislaid

the tracks and Islip was guilty of later acts of negligence which concurred in bringing about the result. The Railroad contends that legally its construction of the track was not negligence and could not reduce its right of indemnification from 100% to 50%. But the contract limitation governs once the jury has found the existence of negligence as defined above. The trial court's instruction was thus in accord with the proper construction of the siding agreement.

The Railroad also contends that in no event could the jury have found that its negligence was on the same level of culpability as Islip's, and consequently it was entitled to full indemnity, citing cases where full indemnity was awarded to other carriers under similar agreements. E.g., *Deep Vein Coal Co.* v. *Chicago & E. I. R. Co.*, 71 F. 2d 963 (7 Cir. 1934); *Booth-Kelly Lumber Co.* v. *Southern Pacific Co.*, 183 F. 2d 902 (9 Cir. 1950); *Atlantic Coast Line R. Co.* v. *Robertson*, 214 F. 2d 746 (4 Cir. 1954); *Baltimore & Ohio R. Co.* v. *Alpha Portland Cement Co.*, 218 F. 2d 207 (3 Cir. 1955). In those cases the injury was produced by the primary negligence of the siding owner, and the carrier's only fault lay in the fact that it had a non-delegable duty to provide a safe place to work for its employees. Here the jury could have found that there was equal culpability—the Railroad having built tracks in an unsafe place and Islip, once aware of the peril, having failed to warn plaintiff of it.

Islip's appeal from the judgment of contribution must fail since there was ample evidence from which the jury could have found that Islip's mill foreman, although aware of the bridge of snow two days before the accident, called for plaintiff's services, instructed him as to the job, and failed to warn him of the bridge of snow. In addition there was evidence that Islip maintained the roof of its warehouse without snow guards, and without other protection

for persons below, although it was sharply pitched, gutterless, and made of smooth sheet metal.

Affirmed.

HAND, *Circuit Judge* (concurring):

I agree that the railroad was negligent in coupling the moving car and locomotive to the standing car while the plaintiff stood under the ice bridge. Moreover, if the plaintiff had been caught between the standing car and the platform a verdict might also have stood because of the closeness of the tracks; but I cannot think that the fall of the ice was a result, the responsibility for which can be made to rest upon that circumstance. In short, I think that that part of the charge was wrong; but the railroad's liability seems to me so plain on the facts, that I think we may and should disregard the error.

As for "Islip", it broke its contract to keep the tracks clear, and for that reason it should contribute.

Judgment of the United States Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Courthouse in the City of New York on the 16th day of November One Thousand Nine Hundred and Fifty-six.

Present: HON. CHARLES E. CLARK
Chief Judge

HON. LEARNED HAND
HON. THOMAS W. SWAN
Circuit Judges

ROBERT R. WANSER,

Plaintiff-Respondent,

against

LONG ISLAND RAIL ROAD COMPANY,

Defendant and Third-Party Plaintiff-Appellant,

against

CENTRAL ISLIP COOPERATIVE G. L. F. SERVICE, INC.,

Third-Party Defendant-Respondent.

Appeal from the United States District Court for the Eastern District of New York.

Judgment of the United States Court of Appeals.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged and decreed that the judgments of said District Court be and they hereby are affirmed.

A. Daniel Fusaro,
Clerk.

Statues Involved.

Section 1 of the Federal Employers' Liability Act of 1908, as amended (Act of April 22, 1908, c. 149, § 1, 35 Stat. 65, 45 U.S.C. § 51) reads as follows:

> "Every common carrier by railroad while engaged in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Rule 51 of the Federal Rules of Civil Procedure, 28 U.S.C., reads as follows:

> "Rule 51. Instructions to Jury: Objection. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the

requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

FILED
MAR 2 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 771

THE LONG ISLAND RAIL ROAD COMPANY,
Defendant and Third-Party
Plaintiff-Petitioner,

against

CENTRAL ISLIP COOPERATIVE G. L. F. SERVICE INC.,
Third-Party Defendant-Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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THE LONG ISLAND RAIL ROAD COMPANY,

Defendant and Third-Party
Plaintiff-Petitioner,

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CENTRAL ISLIP COOPERATIVE G. L. F. SERVICE INC.,

Third-Party Defendant-Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Questions Presented

1. Whether there is sufficient evidence in the record to support the jury's finding that the petitioner, The Long Island Rail Road Company, and the respondent, Central Islip Cooperative, were guilty of concurrent negligence proximately resulting in the accident and injuries to the plaintiff in the main action.

2. Whether there was error in the Court's charge to the jury, and whether the petitioner has preserved its right to assign as error the giving of an instruction to which no proper exception was taken.

Statement

The facts which the jury could have found, since there is substantial testimony in the record to support the finding, are as follows:

The plaintiff in the main action, an employee of the petitioner, Long Island Rail Road Company, while engaged in his duties of coupling freight cars on a railroad siding in front of a warehouse owned by the third-party defendant, Central Islip Cooperatives, was seriously injured when snow and ice which had bridged across from the top of a freight car to the eaves of the warehouse, was pulled loose by the movement of the car and fell, striking the plaintiff on the head and shoulders (114, 154, 232).

The railroad siding where this accident happened had been installed by the Long Island Rail Road Company in 1914, at a time when the warehouse was already in existence (312). The area where the accident occurred was owned by the rail road company (285), and the siding was maintained by it (290, 291). The only change that had been made in the warehouse from the time that the siding was installed up to the time the accident happened was that the roof had been replaced by a tin roof; the eaves, however, and the pitch of the roof had not been changed (316, 330).

When the railroad laid its tracks in front of the warehouse, it laid them so close at the westerly end, the point at which the accident happened, that there was only a foot and a half to two feet clearance between the side of the building and the side of a box car on the tracks (141, 150, 239). The roof of the warehouse at that end overhung the space between the warehouse and the northerly rail of the siding for about 8 to 10 inches (43, 44). There had been heavy snowfalls for several days before the accident and the snow had bridged over this space between the top of an empty freight car, which was standing on the tracks,

and the eaves of the warehouse (114). On the morning of the accident, the railroad's employees had backed in a train on the siding to take out the empty freight car, with the plaintiff making the coupling. When the coupling was made, and as the cars started to move, the snow bridge was pulled away and fell on the plaintiff's head and shoulders (154, 180, 183).

It was an established custom in the railroad business, in moving freight cars as was being done here, that the moving is done under the supervision of the conductor, whose function it is to see that the conditions are such that the car can be moved in safety (152, 272). On this morning the conductor was not there and the movement was made without supervision (152).

The railroad employees denied that they had seen the snow bridge between the roof of the building and the frieght car, but the motorman and the fireman, who were on the locomotive and in the best position to see what the condition was, were not called as witnesses by the railroad company and did not testify.

The switches were cleaned of snow and ice and the side-track was sufficiently clear for the movement of traffic (147, 148). There is no direct evidence that the employees of the Cooperative or of the Rail Road actually knew that there was snow on the roof of the car and on the roof of the building, but from the fact that there was snow everywhere else it could be inferred that it was there also (106). The Rail Road did not engage anyone to remove snow from the roofs of its freight cars nor did the Cooperative engage anyone to remove snow from the roof of its warehouse.

The Court's Charge

Counsel for the railroad company had submitted several requests to charge, but consented to the elimination of all but request No. 14, which was charged (393, 394). The Court then charged request No. 22 of the Cooperative

(394). To that charge the Rail Road took an exception (395). The form of the exception has become important because, when the record was printed, it showed that the Court had omitted, obviously inadvertently, part of the opening sentence of the requested charge and the petitioner now seems to place great emphasis on that change. At the trial, however, the Court's attention was not drawn to the omission and counsel for the railroad company himself specifically precluded the possibility of drawing it to the Court's attention. The following colloquy took place concerning that request and exception:

> "The Court: * * * As to the requests I have not charged. I understand that the plaintiff and the railroad have no objection.
>
> Mr. Blank: No, sir.
>
> The Court: To not charging their particular requests?
>
> Mr. Frost: That is right. But your Honor will recollect that you charged 22 just now. Yesterday you had denied that charge. I would like to take an exception.
>
> The Court: Yes, you can take an exception to that, because they have to consider the place and all about that.
>
> Mr. Thompson: May I have the stenographer read that? Your Honor has read 22.
>
> The Court: What is that?
>
> Mr. Thompson: May I have the stenographer read 22 as your Honor granted it, or as your Honor charged it? I didn't hear it.
>
> Mr. Frost: The stenographer can read it to you later." (395)

Obviously Mr. Frost excepted to request No. 22 being charged in the from in which it was handed to the Court and discussed in chambers, not to any variation of that request made by the Court when reading it to the jury.

Argument

1. THERE IS AMPLE EVIDENCE IN THE RECORD TO SUPPORT THE JURY'S FINDING THAT THE RAIL ROAD COMPANY WAS GUILTY OF JOINT OR CONCURRING NEGLIGENCE, WHETHER THE CLAIM IS LOOKED UPON AS ONE FOR COMMON LAW INDEMNITY OR FOR INDEMNITY PURSUANT TO THE TERMS OF ITS AGREEMENT WITH THE CENTRAL ISLIP COOPERATIVE.

The Rail Road Company seems to lean heavily on its contention that there is something sacrosanct or unique about its so-called "side track agreement." The contention is groundless. The agreement is simple and does little more than define the common law rights of either party to indemnity. If a loss is caused through the active negligence of Central Islip Cooperative, then Central Islip Cooperative is obligated to indemnify the Rail Road; if loss is caused through the joint negligence of both parties, or through the joint negligence of a third-party and of the Rail Road, then there is a right to contribution, but not to indemnity. And it is only in the latter aspect that the contract imposes a burden on Central Islip Cooperative which is not imposed by the common law; since there is no right to contribution between joint tort feasors at common law. (*Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282; *American Mutual Liability Ins. Co.* v. *Matthews*, 182 F. 2d 322.)

The contract does not by its terms impose liability on Central Islip Cooperative for losses not caused by its negligence, or by the negligence of third-parties using the siding, nor does it impose on the Cooperative an obligation to indemnify the Rail Road for losses caused through the Rail Road's independent negligence. It could not be so interpreted since no indemnity contract can be interpreted to indemnify a person against his own independent negligence unless that intention is expressed in unequivocal terms. (*Semanchuck* v. *Fifth Avenue & 37th Street Cor-*

poration, 290 N. Y. 412; *Mostyn* v. *Delaware L. & W. R.R.*, 160 F. 2d 15.) No such intention is expressed in this contract, and its very wording precludes any such interpretation.

The authorities cited by the petitioner in its brief all adopt this interpretation of the so-called side track agreements. Wherever the Industry has been compelled to indemnify the Rail Road, the Industry has been found guilty of active negligence in creating the condition that was responsible for the loss and the Rail Road has been merely passively negligent in failing to discover and remedy the negligent condition created by the Industry. In *Deep Vein Coal* v. *Chicago & E. I. R. Co.*, 71 F. 2d 963, the pole which caused the accident had been erected by the Industry in too close proximity to the tracks; in *Booth-Kelly Lumber Co.* v. *Southern Pacific Co.*, 183 F. 2d 902, the wood cart which caused the plaintiff's accident had been placed in a dangerous situation by employees of the Industry; in *Atlantic Coast Line R. Co.* v. *Robertson*, 214 F. 2d 746, the dinky engine which struck the plaintiff was operated by an employee of the Industry; and in *Baltimore & Ohio R. Co.* v. *Alpha Portland Cement Co.*, 218 F. 2d 207, the hole which caused the derailment of the train had been dug by employees of the Industry. In none of these cases was it shown that the railroad participated in the creation of the dangerous condition, nor was it shown that the railroad was itself guilty of independent, affirmative negligence proximately contributing to the accident and injury. On the other hand, in *Foster* v. *Pennsylvania R. Co.*, 201 F. 2d 727, where both Industry and Rail Road were guilty of independent negligence, the Court in denying indemnity wrote:

> "The jury very well could have reasoned that, had the lighting been sufficient, he would have picked a spot free of cans from which to board the car, so that his steps would not have brought him down on the can. The case is one of concurring negligence which both

parties agree is covered by the last clause of paragraph 8 of the siding agreement, which calls for contribution, not indemnity.

The Rail Road relies heavily on *Booth-Kelly Lumber Co.* v. *Southern Pacific Co.*, 9 Cir., 1950, 183 F. 2d 902, 208 A. L. R. 2d 695, in which a substantially identical clause of a siding agreement was construed so as to require indemnity to the railroad. That case is inapposite, however, because there the lumber company was primarily negligent, the railroad only secondarily so."

The claim for indemnity, therefore, whether for indemnity at common law or indemnity under the contract, must fail because the jury has found that the railroad was guilty of concurrent negligence.

The evidence outlined clearly sustains that verdict. The jury could have found that the railroad was actively negligent in locating its tracks too close to the warehouse; in allowing the snow to accumulate on the roof of its freight car so that it bridged over to the roof of the warehouse; in moving the car while the conductor, whose duty it was to supervise such movement and to see that the car could be moved in safety, was absent; and in moving the car while the bridging of snow and ice remained, without taking any precautions for the safety of its employees in that vicinity. Those findings amply support the ultimate finding that the railroad was guilty of independent, concurrent or joint negligence, proximately resulting in the plaintiff's accident and injury.

It is difficult to understand the argument made in the railroad's brief that the Cooperative should indemnify the railroad if the close clearance of the tracks was a contributing cause of the accident. The agreement provides that the Cooperative shall not erect, or allow to be erected, any building, structure or fixture of any kind nearer than

eight feet from the center of the side track. Concededly the Cooperative did not erect, or allow to be erected, any such building. The railroad located its tracks too close to the warehouse, and the Cooperative had neither the choice nor the right to remove them. They were the railroad's tracks, laid by the railroad's employees, and maintained by the railroad. In fact, the agreement itself specifically states—and this undoubtedly because it suited the railroad's convenience—that the clearances specified in the contract should be maintained "unless such distances are otherwise indicated upon the blueprint attached hereto which shall then govern." The blueprint, printed opposite page 428 of the Appendix, shows the exact location of the sidetrack at the time the agreement was signed. The very provisions of its agreement make the petitioner's argument completely unfounded.

Equally difficult to understand is the tacit assumption by the petitioner that the facts must be taken in the aspect most favorable to the petitioner, not in the aspect most favorable to the jury's verdict. The assumption is without warrant in the law. (*Gunning* v. *Cooley*, 281 U. S. 90, 94; *Lumbra* v. *U. S.*, 290 U. S. 551, 553.) There was in this case, as there is in every case, conflicting testimony, and the testimony given was susceptible of different inferences; but it was the jury's function to reconcile conflicts in the evidence and to draw the inferences, and there seems no room for dispute that, giving the verdict the benefit of the most favorable inferences that can be drawn from the evidence, the finding that the railroad was guilty of joint or concurrent negligence is amply supported.

2. THERE WAS NO ERROR IN THE COURT'S INSTRUCTIONS TO THE JURY, AND NO PROPER EXCEPTION TAKEN TO THE CLAIMED ERRONEOUS INSTRUCTION.

The petitioner objects to the fact that the Court did not define "the proper meaning and application of the phrase, 'joint or concurrent negligence.'" It has been pointed out

that joint or concurrent negligence, whether used in the side track agreement or anywhere else, has a very plain meaning which was made very clear to the jury by the Court in its instructions. Further, counsel for the railroad made no request for any such additional charge and even withdrew the requests to charge which he had submitted to the Court. It is a little inconsistent to complain that the Court did not give instructions which were expressly eliminated from the case by the petitioner's own counsel.

With respect to the exception to the instruction, given in response to request No. 22 of Central Islip Cooperative, it is respectfully submitted that, in the form in which it was submitted to the Court and in the form to which counsel for the petitioner excepted, the charge was perfectly proper. The requested charge reads as follows:

> "If the jury finds that the Long Island Rail Road Company was negligent in the original construction of the railroad siding at the point where the accident happened and erected it in too close proximity of the existing building and that such negligence contributed to the happening of the accident and that the negligence of the third-party defendant at a later date concurred in producing the injury, then there is concurrent negligence." (383)

That instruction seems to express the law correctly. (*Ruping* v. *Great Atlantic & Pacific Tea Co.*, 283 App. Div. 204, 207; *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314, 329-331.) In reading the request to the jury the Court, certainly through inadvertence, omitted the first part of the first sentence, "If the jury finds that the Long Island Rail Road Company was negligent • • •" (383, 394). The omission of that part of the sentence was not adverted to by counsel for the petitioner, who excepted to charging request No. 22 at all (395). And when counsel for the Cooperative asked that the question be read so as to make

sure that it was in the form in which it was presented, counsel for the petitioner interrupted him, saying, "the stenographer can read it to you later." (395) At no time did counsel for the petitioner indicate that he was excepting to the form of the charge and, therefore, precluded the Court from correcting its inadvertence, if correction was necessary.

The worst that can be said of the Court's version of request No. 22 is that it is somewhat confusing. It certainly is not erroneous nor could it possibly have been prejudicial. Since no proper exception was taken, the petitioner is precluded from raising any question as to its form on this petition. (*Hite* v. *Western Maryland Railway*, 217 F. 2d 781, 782.)

3. No special or important reasons exist here for granting a writ of certiorari or which call for the exercise of this Court's power of supervision.

The only significant question raised by this record is whether there is any evidence upon which the jury legitimately could have found that the Central Islip Cooperative was guilty of negligence contributing to the plaintiff's accident. The only evidence in that respect is that snow had fallen on its roof and had not been removed. Since the condition was open and apparent to anybody who exercised his normal faculties, there would seem to be no requirement that the railroad be warned of its existence. There is no proof that snow had ever fallen from the roof before nor is there any proof of circumstances from which the Cooperative might have anticipated danger from the existence of the snow on its roof. With the proof in that state it would seem that the Cooperative was not guilty of any negligent conduct. (*Schmidt* v. *Carper*, 296 N. Y. 791.) However, the jury found from the evidence that the Cooperative was guilty of some negligence contributing to the accident and that finding was affirmed by the Court

of Appeals. Under the circumstances it did not seem to present a proper question on which to base its petition for a writ of certiorari.

What applies to the position of the Cooperative applies with a great deal more force to the position of the railroad company. The jury on ample evidence has found that the railroad was guilty of independent, concurrent negligence which was responsible for the accident. It is difficult to see how they could have found otherwise. The Court's instructions were fair and complete and perfectly satisfactory to the railroad until after the verdict went against it. The only exception taken was an exception to an instruction which was entirely proper, and the argument made here by the railroad company, based upon an exception which it did not take, has no force.

CONCLUSION

For the reasons so stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Patrick E. Gibbons,
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